

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

In the Matter of)

Advanced Television Systems)
and Their Impact Upon the)
Existing Television Broadcast)
Service)

MM Docket No. 87-268

To: The Commission

**OPPOSITION TO WCPX LICENSE PARTNERSHIP'S
PETITION FOR PARTIAL RECONSIDERATION**

Reece Associates Limited, permittee of television broadcast station WZWY, Orlando, Florida ("Reece"), by its attorneys and pursuant to Section 1.106 of the Commission's rules, hereby submits its Opposition to the Petition for Partial Reconsideration filed by WCPX License Partnership ("WCPX-LP"). WCPX-LP requests reconsideration of the FCC's *Sixth Report and Order* (FCC 97-115, released April 21, 1997) issued in the above-captioned docket.

Introduction

Reece holds a permit to construct WZWY to operate on NTSC channel 27 and was assigned DTV channel 14 for station WZWY in the *Sixth Report and Order*. WCPX-LP is the licensee of television broadcast station WCPX, Orlando, Florida, which operates on NTSC channel 6 and was assigned DTV channel 58. In its Petition for Partial Reconsideration, WCPX-LP asks the Commission to assign WCPX channel 6 for DTV operations at the end of the DTV transition period -- a request Reece does not oppose as long as the operation of WCPX on DTV channel 6 is consistent with the Commission's DTV interference standards and will not be harmful to Orlando DTV licensees. In the alternative, however, WCPX-LP asks the Commission to assign DTV channel

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14 (Reece's DTV channel assignment) to WCPX, and to assign DTV channel 58 to WZKY.¹

Reece vigorously opposes this proposition.

WCPX-LP argues that the assignment of DTV channel 58 to WCPX is arbitrary and capricious and puts WCPX at a competitive disadvantage because a "non-core" DTV channel assignment requires WCPX to complete two separate channel changes in order to implement its DTV operations.

WCPX-LP also contends that the Commission should have assigned a channel to WCPX in the "core" DTV spectrum over WZKY because WZKY is an unbuilt station (whereas WCPX is a licensed station) and because WCPX is a network affiliate in a top-30 market and, therefore, subject to special build-out requirements. Moreover, WCPX-LP argues that it should be assigned DTV channel 14 in particular because, aside from channel 46, it is the only available in the Orlando area for WCPX.

WCPX-LP has failed to justify its request to be assigned DTV channel 14. WCPX-LP has not established, as it claims, that the Commission's assignment of DTV channel 58 to WCPX is arbitrary and capricious.² Nor has WCPX-LP shown that permittees are less entitled to core DTV channels than licensees or that the DTV build-out expenses WCPX-LP must incur are unduly burdensome. Finally, WCPX-LP has failed to substantiate its claim that reassigning DTV channel 58 to WZKY would not harm WZKY's operations. Therefore, Reece respectfully requests that the

¹ WCPX-LP requests that it be assigned either DTV channel 14 or channel 46 as opposed to DTV channel 58. DTV channel 46 is assigned to another Central Florida construction permittee. Reece will not address the legal or technical merits of WCPX's request for DTV channel 46.

² See, e.g. *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Insurance*, 463 U.S. 29, 103 S.Ct. 2586 (1983).

Commission deny WCPX-LP's request that it be assigned DTV channel 14 in Orlando.

**The Commission's Allocation of DTV Channel 58 to WCPX
Is Not Arbitrary and Capricious**

The Commission's allocation of DTV channel 58 to WCPX was not arbitrary and capricious. The United States Supreme Court has articulated the test by which agency action must be evaluated in this respect, stating that an agency must "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."³ Put another way, an agency's action is analyzed to determine whether the agency "relied on factors it was not intended to consider, failed to consider an important aspect of the problem, offered an explanation for its decision that is against the weight of the evidence, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."⁴

The Commission engaged in substantial inquiry and review before issuing the DTV channel assignments and gave more than adequate notice that it would use non-core spectrum for DTV channel assignments. The Commission issued a *Sixth Further Notice of Proposed Rulemaking*⁵ in which the Commission sought comment on allocation and assignment issues. Numerous parties submitted comments responding to the *Sixth Further Notice*. After reviewing the parties' comments, the Commission issued the *Sixth Report and Order* which contained a reasoned analysis for the DTV channel assignments made. The Commission articulated its objective in creating the DTV Table of

³ *State Farm*, 463 U.S. at 43, 103 S.Ct. at 2866.

⁴ *Id.*, 103 S.Ct. at 2867.

⁵ 11 FCC Rcd 10968 (1996). As indicated above, this notice was one of many notices issued in the ten-year long DTV rulemaking process.

Allotments as providing “broadcasters with spectrum that is appropriate and technically suitable for DTV use . . . in a manner that minimizes interference to existing NTSC service and provides for a high degree of service replication by new DTV facilities.”⁶ Only after full consideration of allotment issues, and of the voluminous record compiled in this proceeding, did the Commission make DTV channel assignments including the assignment of channel 58 to WCPX. While parties can differ about whether channels 51 through 59 should be maintained as part of the DTV core spectrum, the Commission’s decision to assign DTV channel 58 to WCPX can hardly be considered “arbitrary and capricious.” WCPX-LP’s claim -- a claim made without any attempt to demonstrate a lack of a “rational connection between the facts found and the choice made”⁷ -- is inadequate to support its request for reconsideration.

Construction Permittees Are Equally Entitled to Core DTV Channel Assignments

WCPX-LP nevertheless contends that WZWY is not entitled to a DTV channel assignment in the core DTV spectrum because WZWY is not yet constructed. However, Reece is as entitled as WCPX-LP to a core channel assignment. Both the Congress and the Commission defined DTV-eligibles as “those broadcasters who, as of the date of issuance of the initial licenses, hold a license to operate a television broadcast station or a permit to construct such a station or both.”⁸ As a construction permittee on the date DTV licenses were issued, Reece is an eligible broadcaster and as such is entitled to a DTV channel. Nothing in the Telecommunications Act of 1996 or the *Fifth*

⁶ *Sixth Report and Order* at ¶ 76.

⁷ *State Farm*, 463 U.S. at 2866, 403 S.Ct. at 43.

⁸ See *Telecommunications Act of 1996*, 47 U.S.C. §336(a)(1); *Fifth Report and Order*, FCC 97-116, released April 21, 1997 at ¶ 17. (emphasis added).

Report and Order suggests that permittees are less entitled to a core DTV channel assignment than licensees of stations already broadcasting. Yet, this premise is the sole basis offered by WCPX-LP for its argument that WCPX is more entitled to WZKY's channel assignment.⁹

**WCPX-LP's Claimed "Special Burden" Is No Basis
for Its Proposed Channel Reassignment**

WCPX-LP also attempts to justify its claim to DTV channel 14 by contending that WCPX is especially burdened because it is a network affiliate in a top-30 market and is required to initiate DTV operations no later than November 1, 1999. WCPX-LP also argues that since WCPX was assigned DTV channel 58, and since stations operating on channel 58 will have to relocate at the end of the transition period, it will have to move twice, and should not have to incur the additional expense. WCPX-LP also asks that it be allowed to pass off any additional costs for DTV conversion to Reece.

WCPX is not entitled to a new DTV channel assignment merely because its costs may end up being greater than the costs incurred by other licensees and permittees. If this were the standard, there might never be a settled allotment plan since the costs of converting to DTV operations will differ from station to station all across the nation.

In any event, it is not clear that Reece's costs for converting WZKY will be notably lower than WCPX-LP's costs. It is even less clear that, if the costs of converting to DTV channel 58 are greater, that Reece should bear the greater costs. If this were the case, then

⁹ WCPX-LP also alleges that "there is no indication of [WZKY's] likely construction in the foreseeable future." Petition for Reconsideration at ¶ 17. However, there is ample record evidence that Reece is poised and ready to construct WZKY immediately and Reece has so notified the Commission (*see* Amendment to Application for Extension of Time to Construct WZKY and to Application for Modification of Construction Permit (FCC File Nos. BMPCT-950612KG and BMPCT-951025KD) filed June 10, 1997).

presumably every station in every market would be claiming reimbursement from some other station. Once again, such a scenario would be a prescription for delaying the inauguration of DTV service indefinitely.¹⁰

WCPX-LP's Proposed Channel Reassignment Lacks Technical Merit

Finally, WCPX-LP claims WCPX should be assigned DTV channel 14 because no other acceptable core DTV channels are available for WCPX in the Orlando market. WCPX-LP further suggests that it is technically feasible for WCPX and WZKY to exchange channel assignments.

The Commission has not yet determined precisely the range of channels that will constitute the core DTV spectrum. Thus, the issue of DTV channel assignments in "non-core" spectrum is an issue which should be addressed on a policy level rather than case-by-case as proposed by WCPX-LP.

In so far as WCPX-LP's technical feasibility point is concerned, WCPX-LP has failed to submit a reliable engineering analysis regarding the impact the proposed exchange would have on WZKY. The deficiencies in WCPX-LP's showing are detailed in the attached statement of Reece's consulting engineer, Donald Everist of Cohen, Dippell & Everist. Even if there were a legal basis for WCPX-LP's suggested channel exchange -- which there is not for all the reasons set forth above -- WCPX-LP would still fail to sustain its technical burden.¹¹

¹⁰ WCPX-LP also argues that it should have a core channel associated with its programming from DTV inception to alleviate the necessity of informing the public on how to find its programming after the transition period ends. WCPX is not in a unique situation and this rationale is hardly an adequate justification for the drastic action WCPX-LP requests.

¹¹ For example, Reece has a modification application pending before the Commission to relocate WZKY's tower to a site with coordinates different from the coordinates listed in the *Sixth Report and Order*. Any DTV channel assignment proposal by WCPX-LP must be supported by an engineering study demonstrating the absence of harm to WZKY for both sites. WCPX-LP had provided no such study.

Conclusion

WCPX-LP has failed to establish that the Commission's actions were arbitrary and capricious under established standards. Moreover, WCPX-LP has offered no legal justification for its claim to DTV channel 14 and it has failed to adequately demonstrate that its proposed channel "exchange" will not harm WZWY operations. Based on the foregoing, Reece respectfully requests that the Commission deny WCPX-LP's request to reassign to WCPX-LP DTV channel 14.

Respectfully submitted,

REECE ASSOCIATES LIMITED

By: Naomi S. Travers

Gerald Stevens-Kittner

Naomi S. Travers

ARTER & HADDEN

1801 K Street, N.W.

Suite 400K

Washington, D.C. 20006

(202) 775-7100

Its Attorneys

July 18, 1997

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ENGINEERING STATEMENT
RESPONSE TO PETITION FOR RECONSIDERATION
IN MM DOCKET NO. 87-268
ON BEHALF OF
REECE ASSOCIATES, LIMITED
RE WZWY(TV), ORLANDO, FLORIDA

JULY 1997

COHEN, DIPPELL AND EVERIST, P.C.
CONSULTING ENGINEERS
RADIO AND TELEVISION
WASHINGTON, D.C.

COHEN, DIPPELL AND EVERIST, P. C.

City of Washington)
) ss
District of Columbia)

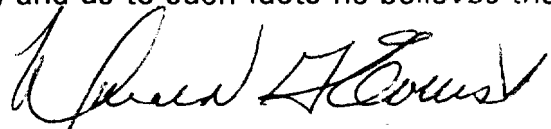
Donald G. Everist, being duly sworn upon his oath, deposes and states that:

He is a graduate electrical engineer, a Registered Professional Engineer in the District of Columbia, and is President of Cohen, Dippell and Everist, P.C., Consulting Engineers, Radio - Television, with offices at 1300 L Street, N.W., Suite 1100, Washington, D.C. 20005;

That his qualifications are a matter of record in the Federal Communications Commission;

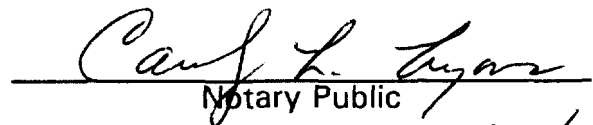
That the attached engineering report was prepared by him or under his supervision and direction and

That the facts stated herein are true of his own knowledge, except such facts as are stated to be on information and belief, and as to such facts he believes them to be true.



Donald G. Everist
District of Columbia
Professional Engineer
Registration No. 5714

Subscribed and sworn to before me this 17th day of July, 1997.


Notary Public

My Commission Expires: 7/28/98

This engineering statement has been prepared on behalf of Reece Associates, Limited, permittee of WZKY(TV), Orlando, Florida. WZKY(TV) has authorized this firm to review the Petition for Reconsideration in MM Docket 87-268 concerning "In the Matter of Advanced Television Systems and Their Impact Upon the Existing Television Broadcast Service."

This review has identified many issues which WZKY(TV) will consider and will offer its ideas as permitted by the Federal Communications Commission ("FCC") in the Public Notice dated July 2, 1997. This Notice permits further time until August 22, 1997 in which to address the issues concerning prediction methodology as specified in OET Bulletin No. 69. The review also identified an additional filing in the form of a Petition for Reconsideration in MM No. Docket 87-268 prepared on behalf of Television Station WCPX-TV, Channel 6 licensed to Orlando, Florida. This engineering statement is directed to that filing.

WZKY(TV) notes that in the engineering statement accompanying WCPX-TV's petition for reconsideration that WCPX-TV requests that it be permitted to use the DTV assignment (Channel 14) specified by the FCC to be used by WZKY(TV) for the WCPX-TV DTV operation. Similarly, WCPX-TV proposes that WZKY(TV) be given the WCPX-TV, Channel 58 DTV allotment in return. WZKY(TV) opposes this request since WCPX-TV engineering statement offered no studies to support its conclusion that this DTV channel swap would be mutually beneficial for both stations.

WCPX-TV's engineering statement only basis for the swap of DTV channels is that WZKY(TV) has a construction permit and has not yet built its facility. The WCPX-TV engineering statement did not elaborate that WZKY(TV) has not constructed its facilities because it has been in a long and protracted search for a site location which would receive FAA airspace approval and be consistent with all FCC siting criteria. WZKY(TV) notes that it believes that it has a site from which the station can be constructed, it has received local zoning approval, it has FAA airspace clearance and it has filed an amendment to its outstanding construction permit (BPCT-850320KR) at the FCC on July 10, 1997.


Furthermore, WCPX-TV makes no mention that the NAB/Broadcast Caucus has determined for the WCPX-TV facility that Channels 4, 5, 60, 61, 62, and 63 are possible alternate DTV candidates.

Therefore, until WCPX-TV can offer an engineering demonstration, that is DTV channel request is technically valid, WZKY(TV) respectfully opposes this request.

CERTIFICATE OF SERVICE

I, Diane Uduebor, a secretary at the law firm of Arter & Hadden, hereby certify that the foregoing Opposition to Petition for Partial Reconsideration has been sent, via first class mail on this 18th day of July, 1997 to the following:

Lawrence Roberts, Esq.
Roberts & Eckard, P.C.
1150 Connecticut Avenue, N.W.
Suite 1100
Washington, D.C. 20036
Counsel for WCPX License Partnership


Diane Uduebor